

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

In the Matter of R.K., et. al
on behalf of those similarly situated,

Plaintiffs,

v.

Case No. 3:21-cv-00725
Judges Crenshaw/Frensley

GOVERNOR BILL LEE, et. al.

Defendants.

**PLAINTIFFS' REPLY TO GOVERNOR LEE'S RESPONSE TO MOTION TO
REQUIRE THE PRESENCE OF DECISION-MAKERS AT MEDIATION OR, IN THE
ALTERNATIVE, TO REQUIRE DECISION-MAKERS TO APPROVE OR REJECT
ANY TENTATIVE SETTLEMENT WITHIN TEN (10) DAYS OF THE MEDIATION**

COME NOW Plaintiff R.K. et al, filing this Reply to the Governor's Response (D.E. 145) to Plaintiffs' request to have a decision-maker present at mediation or, at least, approve a settlement within ten days.

* * *

Governor's Lee's response recognizes that the Attorney General may not lawfully act as both client and lawyer in settling a lawsuit except in circumstances where the settlement is for \$25,000 or less. Tenn Code Ann §20-13-103. In all other cases, the normal laws of lawyering apply—that is, lawyers advise, clients decide. *See id*; see also, Tenn. R. Sup. Ct. Rule 1.2.

It is for this reason Plaintiffs ask that decision-makers with actual authority attend the mediation. Being part of the mediation involves listening to arguments, contributing feedback, and permitting the mediator to facilitate obstacles *so that* the goal of the Court's Order (D.E. 142) is

reached. Without decision-makers, the Court-ordered mediation will again consist of lawyers talking to each other without a decision-maker. It will result in an eventual approval (or denial) that may extend the matter for months, with no reason given in the event of denial. *That* course has proved unsuccessful and is to be avoided.

But if attendance on the day of mediation is not possible, even by telephone, Plaintiffs have at least requested a decision within 10 days thereafter. It is not ideal, but it prevents Plaintiffs' counsel from waiting months on end (maybe longer) for actual decision-maker to become engaged.

Plaintiffs do not intend for this to be a controversial motion. They reiterate they have worked well with the opposing lawyers. Having decision-makers present at mediation or shortly thereafter is necessary simply to avoid problems of the past: time-consuming negotiations rejected months later by decision-makers not present to contribute at the time of negotiation.¹

In terms of the Governor's argument about receiving an offer, Plaintiffs' counsel are compiling time involving multiple counsel and years, with lawyers swapping mediator names as the Court instructed by November 9. (D.E. 142) But Plaintiffs' motion does not concern the making of offers and counters, but even more basically, having persons with legal authority to consider and promptly act upon them.² For these reasons, the motion should be granted.

¹ Indeed, mediators almost universally require the presence of decision-makers. Even in cases where board approval is required, it is not unusual to have a board chair or at least one person of authority present.

² The fees are obviously more than the \$25,000 cap on the ability of the Attorney General to act both as lawyer and client in settlements.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I certify that this Reply to Response to Motion to Require the Presence of Decision-Makers at Mediation, or in the Alternative, to Require Decision-Makers to Reject or Approve of the Tentative Settlement Within Ten (10) Days of Mediation was served upon counsel of record at the contact information below for the Defendants, through the Court's ECF filing system on October 26, 2023.

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